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Democracy and Religion in the Political and Legal Thought of Ernst-Wolfgang Böckenförde¹

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“The liberal secularised state is nourished by presuppositions that it cannot itself guarantee.”² This statement articulated by German constitutional theorist and judge Ernst-Wolfgang Böckenförde is illustrative of a fundamental concern of postwar European and especially German political thought: the anxiety that the liberal democratic order suffers from a deficit of substance that might threaten its sustainability.³ This concern remains central to contemporary democratic theory and to many reflections on the place of religion in the modern world. Böckenförde’s statement, however, has acquired a life of its own since its coinage in 1964.⁴ It is often wielded in support of positions that are at odds with its author’s original intentions and has led to a misunderstanding of Böckenförde’s thought.⁵ The dictum has been taken to imply that religion is the *only* source of normative substance and that we always *require* religion to sustain the democratic state.

Although Böckenförde is hardly a household name for Anglo-American political theorists and intellectual historians, in Germany, the famous legal scholar, public intellectual and judge on the Federal Constitutional Court has been referred to as “the Einstein of public law” whose famous dictum represents the $E=mc^2$ of German public law.⁶ In recent years, some of Böckenförde’s work has made its way across the Atlantic, in part thanks to Jürgen Habermas’s engagement with the dictum and the profusion of scholarship on the question of secularisation

¹ For their comments and remarks at various stages of this work, I am very grateful to Peter E. Gordon, Dieter Gosewinkel, Udi Greenberg, Jens Hacke, Mirjam Künkler, Jean-Claude Monod, Dirk Moses, Samuel Moyn, Jan-Werner Müller, Paul Nolte, Tine Stein and Noah Strote.

² Ernst-Wolfgang Böckenförde, “Die Entstehung des Staates als Vorgang der Säkularisation”, in *Säkularisation und Utopie. Ebracher Studien* (Stuttgart, 1967), 75-94, at 93.

³ For a broad survey of this trend in postwar European politics see: Jan-Werner Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (New Haven, 2011).

⁴ Böckenförde coined the dictum in his contribution to the Ebracher Seminars held in October 1964. On these seminars see: Florian Meinel, “Die Heidelberger Secession. Ernst Forsthoff und die ‘Ebracher Ferienseminare,’” *Zeitschrift für Ideengeschichte* 05 (2011), 89-108.

⁵ For an excellent overview of the skewed reception of the dictum see: Hermann-Josef Große Kracht, “Fünfzig Jahre Böckenförde-Theorem,” in Große Kracht, eds., *Religion — Recht — Republik* (Paderborn, 2014), 155-64; Sylvie Le Grand, “Le ‘paradoxe’ Böckenförde, fortune d’une formule,” *Revue d’Allemagne*, 46 (2014), 125-36.

⁶ Heribert Prantl, “Der Einstein des Staatsrechts,” *Süddeutsche Zeitung*, 18 September 2010.

and the place of religion in modern democratic politics.⁷ Böckenförde has also gained some currency outside of German faculties of law due to his relationship to legal theorist Carl Schmitt.⁸ To this day, however, the connection between Böckenförde's theory of democracy and his assessment of the role of religion in the modern secular state is still too little understood. Engaging with the growing body of literature in German, French and Italian and drawing on both Böckenförde's published works and archival materials, this article seeks to replace Böckenförde's writings on religion and democracy in their intellectual and historical context of origin.

In the extant literature, Böckenförde's thought is often reduced to two elements: his famous dictum and his close relationship to Carl Schmitt. In fact these two reductionist interpretations of Böckenförde are often contiguous insofar as the dictum is read as betraying his Schmittianism.⁹ Understood in the broader context of Böckenförde's intellectual development and project, his dictum highlights his oft-neglected intellectual debts to the philosopher Joachim Ritter, and Social Democrat jurists Adolf Arndt and Hermann Heller.¹⁰ In between Schmitt and Ritter, Arndt and Heller, Böckenförde's work highlights the fragility of the secular liberal democratic order while embracing it. When read correctly, the dictum might appear paradigmatic of Böckenförde's thought as a whole insofar as it is illustrative of his resistance to any attempts to permanently solve the tensions inherent to the liberal democratic project.

⁷ Jürgen Habermas, *Between Naturalism and Religion*, trans. Ciaran Cronin (Malden, 2008); Jürgen Habermas and Joseph Ratzinger, *The Dialectics of Secularization*, trans. Brian McNeil (San Francisco, 2006). On Habermas's engagement with the dictum: Peter E. Gordon, "Between Christian Democracy and Critical Theory: Habermas, Böckenförde, and the Dialectics of Secularization in Postwar Germany," *Social Research*, 80 (2013), 173-202.

⁸ The most comprehensive treatment in English is provided by Jan-Werner Müller, *A Dangerous Mind: Carl Schmitt in post-war European thought* (New Haven, 2003). Also see: Peter M. R. Stirk, *Twentieth Century German Political Thought* (Edinburgh, 2006) and David Dyzenhaus, ed., *Law as Politics: Carl Schmitt's Critique of Liberalism* (Durham, 1998).

⁹ Werner Becker, "Das Verfassungsdilemma des Liberalismus. Zur Kritik des Böckenförde-Paradoxons der Demokratie," *Kritisches Jahrbuch der Philosophie*, 7 (2007), 47-52. Also see the contributions to the issue titled "Humanismus und Böckenförde-Diktum," *Humanismus Aktuell*, 22 (2008).

¹⁰ Jens Hacke has worked out the connections between Ritter and Böckenförde but his work draws exclusively on published materials. Olaf Köppe portrays Böckenförde's constitutional theory as indebted to conservative Weimar state theory, especially Carl Schmitt, with a hint of Hegelianism but he misses the connection to Ritter, Arndt and Heller. Reinhard Mehring portrays Böckenförde as the "liberalizer" of Carl Schmitt. Johanna Falk draws on Böckenförde's published works to provide a systematic reconstruction of his political philosophy of freedom, but glosses over the intellectual and historical contexts of Böckenförde's arguments. Hacke, *Philosophie der Bürgerlichkeit*; Olaf Köppe, "Politische Einheit und pluralistische Gesellschaft," *Kritische Justiz* (1997), 44-62; Reinhard Mehring, "Zu den neu gesammelten Schriften und Studien Ernst-Wolfgang Böckenfördes," *Archiv des öffentlichen Recht* (1992), 449-73; Johanna Falk, *Freiheit als politisches Ziel* (Frankfurt, 2012), 147-205. A generous portrait of Böckenförde in the intellectual life of the early Federal Republic is provided by: Klaus Große Kracht, "Unterwegs zum Staat," in Große Kracht, eds., *Religion — Recht — Republik*, 11-40.

DEMOCRATIC ETHOS & RELATIVE HOMOGENEITY

If religion or nationalism could no longer provide the unifying bond that buttresses the political order with transcendental legitimacy and affective support, how could liberal democracies ensure their stability, or even their survival? Were liberal democracies doomed to remain substanceless? In the fledgling democracy of West Germany, these questions were no mere abstractions. They were especially important for a young legal scholar who had written two doctoral dissertations on the history of German constitutionalism.¹¹ Indeed, Böckenförde was trained in German faculties of law that remained deeply steeped in the interwar critiques of legal positivism most famously wielded by Carl Schmitt against Hans Kelsen. Unwilling to recognize its dependence on a preprocedural collective substance, the liberal constitutional state (*Rechtsstaat*), so the Schmittian argument went, was incapable of providing the normative framework for the artificiality of its constitutional norms. A constitution that “forgoes imposing a substantive order, but chooses instead to give warring factions, intellectual circles, and political programs the illusion of gaining satisfaction legally” would only end “by destroying its own legality and legitimacy,” Schmitt warned in 1932.¹²

As John McCormick writes, “the potentially problematic relationship of legality and legitimacy continued to haunt German political thought throughout Germany’s second attempt at constitutional democracy.”¹³ Indeed, in postwar Germany, the failure of the Weimar Republic served to reinforce the diagnosis of its critics rather than discredit interwar antiliberal thought. Its collapse was thus widely understood to be the inevitable fate of value-neutral legalistic parliamentarism and liberal constitutionalism. While democracy was the order of the day, after 1945 this democracy thus needed to be of a fundamentally different character than Weimar.¹⁴ The argument that the state ought to be more than a legal fiction, that it needed to be preceded by what Carl Schmitt called a “political form” or what Hegel called “*sittliche Substanz*”—a collectivity bound by a set of value commitments, a common “ethical ground”—took on enormous currency in the Federal Republic. The belief that the democratic order lacked any ethical-political substance, for instance, justified the appeal to divine sanction in the writing of the Basic Law.¹⁵

¹¹ Böckenförde defended his doctoral dissertation in law in autumn 1956 and it was published as Ernst-Wolfgang Böckenförde, *Gesetz und gesetzgebende Gewalt* (Berlin, 1958). He completed his history Ph.D. thesis in the spring of 1960: Ernst-Wolfgang Böckenförde, *Die deutsche verfassungsgeschichtliche Forschung im 19. Jahrhundert* (Berlin, 1961).

¹² Carl Schmitt, *Legality and Legitimacy* [1932], trans. Jeffrey Seitzer (Durham, 2004), 94.

¹³ John McCormick, “Introduction,” in Schmitt, *Legality and Legitimacy*, xiv.

¹⁴ See: Sebastian Ullrich, *Der Weimar-Komplex* (Göttingen, 2009).

¹⁵ Rainer Forst, “A Tolerant Republic?”, in Müller, ed., *German Ideologies*, 216.

Postwar German legal culture continued to be marked by an anti-positivist consensus shared both by the decisionist-étatiste camp associated with Schmitt (to which Böckenförde is generally linked) and the integrationist school led by Rudolf Smend.¹⁶ Far from condemning modern procedural liberalism and legal positivism, Böckenförde's political and legal theory, however, is intent to show that legal positivism and liberal democracy do not require axiological foundations external to themselves in order to obviate their supposed defenselessness.¹⁷ To see how Böckenförde proposed to solve the legality and legitimacy conundrum, we need to examine some of his earlier writings and the context in which they originated.

In the spring of 1957 Böckenförde attended a conference in Munich titled "Christian Faith and Political Decision" organized by an organization of social democratic academics (*Arbeitsgemeinschaft Sozialdemokratischer Akademiker*).¹⁸ The keynote address was delivered by Adolf Arndt, a member of the SPD faction of the Bundestag and a prominent jurist who had earned the informal title of "Kronjurist of the SPD."¹⁹ Arndt, a Protestant who had been persecuted by the Nazis for being "half Jewish," spoke about the relation between Christianity and liberal socialism (*freiheitlicher Sozialismus*). In this address, Arndt sought to defend the SPD against the attacks of the CDU-CSU and members of the clerical elite that portrayed the Social Democrats as belonging to a godless and materialist party, and therefore incompatible democracy.²⁰ Arndt, however, also sought to encourage a more welcoming attitude towards religion by his fellow party-members, a

¹⁶ See: Günther, *Denken vom Staat her*. Also see: Müller, *Dangerous Mind*, 68-79.

¹⁷ Becker, "Das Verfassungsdilemma." On the Schmitt/Kelsen debate see: David Dyzenhaus, *Legality and Legitimacy. Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (New York, 1997); Peter Caldwell, "Legal Positivism and Weimar Democracy," *American Journal of Jurisprudence*, 39 (1994), 273-301.

¹⁸ Adolf Arndt et. al., *Christlicher Glaube und Politische Entscheidung* (Munich, 1957) reprinted in Adolf Arndt, *Politische Reden und Schriften* (Bonn, 1976), 113-33. Böckenförde describes this encounter with Arndt in: Ernst-Wolfgang Böckenförde, "Begegnung mit Adolf Arndt," in Claus Arndt ed., *Adolf Arndt zum 90. Geburtstag* (Bonn, 1995), 32-39. In the biographical interview conducted by Dieter Gosewinkel Böckenförde also admits that Arndt would play an important role in his subsequent entry into the SPD, see: Böckenförde, *Wissenschaft, Politik, Verfassungsgericht*, 408-9.

¹⁹ see : "Adolf Arndt," *Der Spiegel* 48 (1962), accessed November 20, 2015:

<http://www.spiegel.de/spiegel/print/d-45124968.html>

²⁰ The political platform of the newly formed Christian democratic parties (the CDU and its Bavarian counterpart, the CSU) rested on the assertion that democracy was *dependent* upon Christianity. The concomitant claim that a particular Christian *Weltanschauung* is central to the defense of democracy invited the argument that a secular *Weltanschauung* could be held responsible for democratic failures. Moreover, if the ethical-political substance of the democratic polity originated in Christian natural law, then the political party officially endorsed by the Christian Churches would seem to benefit from a privileged access to this higher norm. This rhetoric provided a convenient political tool to discredit the CDU's chief political opponents: because they were "godless," the Socialists of the SPD and the Liberals of the FDP were implicitly deemed less "democratic" than the Christian Democrats. As a student in Münster, Böckenförde witnessed this rhetoric in the sermons of local Bishop Michael Keller. The sermons have been reprinted in Laurenz Böggering, ed., *Iter para tutum. Apostolat in der modernen Welt. Hirtenworte des Bischofs von Münster, Michael Keller* (Münster, 1961). For the remarks that particularly angered Böckenförde see page 466. For Böckenförde's recollections on Keller see: Böckenförde, *Kirche und christlicher Glaube*, 7.

stand that reflected both practical political considerations and Arndt's personal religious commitments.²¹

Arndt argued that a reconciliation of social democracy and religion required a meditation on the meaning of democracy. In a truly liberal (*freiheitliche*) democracy, Arndt declared, political parties should not dogmatically cleave to any specific comprehensive doctrine or *Weltanschauung*. It did not matter whether the comprehensive doctrine in question was Christian natural law or Marx's historical materialism, whether it had a sacred or a profane origin: both were totalizing doctrines that laid an absolute claim to truth and therefore could not sustain a democratic order premised on the principles of liberty and equality. Arndt continued: "A democratic party cannot turn its historically conditioned answers" to the questions under democratic scrutiny "into basic matters of faith."²² In Arndt's view, any genuinely democratic order needed to forgo the model of political parties based in all-encompassing and absolutely valid doctrines. In a democracy, Arndt declared, "that is to say in a state with [genuine] opposition, a political party cannot identify itself with the whole [*das Ganze*] without falling in contradiction with itself and with that state." Arndt's conception of democracy precluded the existence of *Staatsparteien* (political parties that identify themselves with the state) or *Kirchenparteien* (political parties officially associated with a Church) but it also anticipated the SPD's formal break with Historical Materialism in its 1959 Bad Godesberg program which Arndt helped draft.²³ *Weltanschauungsparteien* needed to be replaced by *Gesinnungsgemeinschaften*, that is a political community whose members are united in their historically contingent, changeable and fallible political convictions. Arndt envisioned the role of the Churches in a democratic order as one of *Partnerschaft* with other political and social forces, where each partner recognizes and accepts each other's independence.²⁴ What makes this partnership possible, Arndt maintained, was the prepolitical consensus underlying the very possibility of a democratic polity: "an agreement as to what cannot be voted on."²⁵

Arndt thus implicitly questioned the CDU's commitment to the principles of liberal democracy. He went even further, insinuating that the Christian Democrats' practice of politics, albeit conducted "in the name of God," was not deployed "in His service."²⁶ In other words, Arndt

²¹ Arndt's address may not articulate anything especially original or new for the liberal Protestant milieu, but it is significant here because Böckenförde was directly moved by it. On the affinities between liberal Protestants and the SPD see: Benjamin Pearson, "The Pluralization of Protestant Politics: Public Responsibility, Rearmament, and Division at the late 1950s Kirchentage," *Central European History*, 43 (2010), 270-300.

²² Arndt, *Politische Reden und Schriften* (Bonn, 1976), 132.

²³ See Dieter Gosewinkel, *Adolf Arndt: Die Wiederbegründung des Rechtsstaats aus dem Geist der Sozialdemokratie 1945-1961*, (Bonn, 1991).

²⁴ *Ibid.*, 525.

²⁵ Arndt, "Christentum," 128.

²⁶ *Ibid.*, 131.

argued that religion could not furnish a transcendent source of legitimacy to democratic politics, religion could only inform each individual's political conduct within the immanent process of electoral politics. Christianity and "liberal socialism" could thus be fully compatible as long as they were no longer conceived as totalizing doctrines subsuming the individual into the collective, but rather originated from within "the beating heart of each actual human being."²⁷

Arndt's address did not fall on deaf ears with Böckenförde who, "as a practicing Catholic was [already] concerned about the structure of modern democracy and its realization in the Federal Republic."²⁸ Indeed, it was this encounter with Arndt that prompted Böckenförde to make his debut as a public intellectual with an essay on "The Ethos of Modern Democracy and the Church."²⁹ The essay appeared in the conservative Catholic journal *Hochland* only a few weeks after Konrad Adenauer's CDU had won a landslide in the 1957 federal elections.³⁰ Arndt had touched upon important themes for a young constitutional scholar who had immersed himself in the works of Carl Schmitt. In Arndt's critique of *Weltanschauungsparteien* Böckenförde later declared that he had detected the Schmittian lesson on the political:³¹ "How could democracy succeed if electoral decisions and political commitments were not taken according to political considerations" but rather according to pre-constituted and immutable ideological or ethical concern?³² As long as political parties were engaged in internecine disputes questioning the legitimacy of each other's *existence*, liberal democracy would be doomed.³³ Böckenförde likely had in mind Schmitt's interwar writings on the aporias of parliamentary democracy and the limits of democratic pluralism where Schmitt had warned his readers against the "plurality of loyalties:" Whence "loyalty to the state takes no precedence" against competing loyalties "to the church, union or family," the state is not only "weakened and relativized" but it can also be undone, Schmitt wrote.³⁴ Böckenförde was

²⁷ Ibid., 133.

²⁸ Böckenförde, "Begegnung," 33.

²⁹ Ernst-Wolfgang Böckenförde, "Das Ethos der modernen Demokratie und die Kirche," *Hochland* 50 (1957), 4-19 reprinted (among other places) in Böckenförde, *Kirche und christlicher Glaube*, 9-25. In the following issue of *Hochland* appeared Hermann-Joseph Spital's critique of the essay, as well as Böckenförde's rejoinder: "Noch einmal: Das Ethos der modernen Demokratie und die Kirche," *Hochland* 50 (1958), 409-21 reprinted in Böckenförde, *Kirche und christlicher Glaube*, 27-49. At the time, Spital was the assistant to the Münster bishop Michael Keller.

³⁰ Böckenförde, *Wissenschaft, Politik, Verfassungsgericht*, 393-5. Böckenförde developed his ideas independently of Arndt, but it was because he felt vindicated by Arndt's words that Böckenförde finally decided to put pen to paper.

³¹ Arndt himself would have likely recoiled at the parallel with Schmitt: see Gosewinkel, *Adolf Arndt*, 531-3.

³² Böckenförde, "Begegnung," 33.

³³ Böckenförde would work out these questions in "Der Begriff des Politischen als Schlüssel zum staatsrechtlichen Werk Carl Schmitts," in Quaritsch, ed., *Complexio Oppositorum*, 283-299.

³⁴ Carl Schmitt, "State Ethics and the Pluralist State" in Arthur J. Jacobson and Bernard Schlink, eds., *Weimar. A Jurisprudence of Crisis*, trans. Belinda Cooper (Berkeley, 2000), 300-12, at 302. Böckenförde did not read Schmitt's "Concept of the Political" until 1958 as is evident from a letter from Böckenförde to Schmitt dated April 20, 1958 Düsseldorf, RW265-1632. On Böckenförde's reception of Schmitt's writings on the "plurality of loyalties" see: Jean-Claude Monod, "Homogénéité, révision constitutionnelle et décision fondamentale," *Revue d'Allemagne*, 46 (2014), 111-24.

receptive to the problem Schmitt had raised; that some degree of unity is required in order to sustain pluralism and ensure the preeminence of civic loyalty. He did not, however, endorse Schmitt's solutions of an authoritarian state and an illiberal populist democracy grounded in the national homogeneity of the German *Volk*. In fact, the solutions that Böckenförde would put forth in his 1957 essay could hardly have been more dissimilar to those advocated by Schmitt. What made Arndt's thought so congenial to Böckenförde, thus, resided perhaps less in the latter's fascination with Schmitt's work, than in a common intellectual debt to Hermann Heller. Arndt's assertion that democracy "is first and foremost an agreement about that which cannot be voted upon" is deeply reminiscent of Heller's writings. It is not coincidental that Arndt's statement stuck with Böckenförde well after 1957, as he cites it in text after text throughout his career.³⁵ Explicitly aiming to refute Schmitt, in a text first published in 1928 Heller maintained that the foundation of parliamentarism is "the belief, not in public discussion as such, but in the existence of a common foundation for discussion."³⁶

The most crucial argument Böckenförde advanced in his 1957 essay must be understood in this light: Böckenförde wanted to demonstrate that liberal democracy rests on ethical foundations that do not emanate from transcendent sources of authority but rather from within itself. Indeed, "that which cannot be voted upon," are the merely "formal" principles of democratic rule; the constitutional provisions that ensure that the political order is effectively built on freedom and equality.³⁷ While German conservative political and legal theory insisted on the insufficiently robust normative character of these merely formal principles, Böckenförde maintained that modern democracies are not a "value-neutral technique of political will-formation" but rather "a political system whose normative foundation lies in the principles of democratic freedom and political equality."³⁸

³⁵ Böckenförde first cites Arndt's formulation in his rejoinder to Hermann Josef Spital's critique of his 1957 article, reprinted in Böckenförde, *Kirche und christlicher Glaube*, at 41.

³⁶ Hermann Heller, "Political Democracy and Social Homogeneity," in Jacobson and Schlink, eds., *Weimar*, 256-64, at 260. As Dyzenhaus explains, Heller "was merely pointing out that the belief in the worth of public discussion requires a belief in the existence of a social and political foundation for such discussion which makes it possible to live with the result of such discussion, even when it is not to one's liking." Dyzenhaus, *Legality*, 191.

³⁷ Thus, any genuine democratic order needed to ensure that the conditions for the equal exercise of one's political freedom were effectively in place. This is why electoral freedom (*Wahlfreiheit*), electoral equality (*Wahlgleichheit*), freedom of conscience broadly defined, and liberty of the press belong to the "democratic basic rights" (*demokratische Grundrechte*) that are not at the disposition of electoral majorities. Because the "eternity clause" (Art. 79 §3) protects these fundamental principles as laid down in articles 1-20 of the Basic Law (including the democratic and republican character of the Federal Republic) against any constitutional amendments or revisions, Böckenförde believes that formalistic liberal democracies are indeed capable of protecting themselves against their internal enemies. Böckenförde, *Kirche und christlicher Glaube*, 15.

³⁸ *Ibid.*, 15. In a letter to Albrecht Beckel, Böckenförde maintained that the extensive basic rights guarantees in the Basic Law "rely less on a recognition of natural law principles than on a reaction against the Nazi era and [originate] therefore from a moving and far-reaching agreement on that which cannot be voted upon." Letter from Ernst-Wolfgang Böckenförde to Dr. Albrecht Beckel, dated April 27, 1958. Bundesarchiv Koblenz. N1538 Box 636.

The principle of majority-rule, Böckenförde explained, is not only a technical instrument necessary for democracies to operate, it bears in itself the fundamental ethics at the core of modern democracy.³⁹ If majority rule is the logical consequence of erecting the principles of individual freedom and equality as chief principles of collective life, the same principles are also what safeguards it from degenerating into a “tyranny of the majority.” For if all political opinions are to be treated equally from the standpoint of the law, and if all citizens are to exercise their democratic freedoms equally, then it precludes the possibility that the majority in power could assert itself in an absolutist manner. The right of the majority to pass laws that are binding for everyone—that is the majority’s temporary control over legality—is predicated upon the competition with the minority over political leadership. It supposes that the minority always retains the *possibility* to become the majority. Recognizing the “*Diskussionswürdigkeit*” and “*demokratisches Lebensrecht*” of one’s political opponents—without necessarily endorsing the specific contents of their programs—is what guarantees the stability of the system: it is what makes it possible, as Heller maintained, to live with the outcome of a political decision one might not support.⁴⁰ More importantly, this “genuine readiness to compromise” represents “the ethical underpinnings and the innermost kernel” of modern democracy because it relies on a tacit “agreement as to what cannot be voted upon.”

In some of his later writings, Böckenförde uses the term “homogeneity” to designate the conditions for the emergence of a pre-political agreement on the minimal ethical norms required for peaceful coexistence within a pluralist political community. The rhetoric of homogeneity is often interpreted as an indicator for Böckenförde’s intellectual kinship to Carl Schmitt and corroborates the simplistic image of him as a staunchly conservative thinker.⁴¹ We might recoil at Böckenförde’s use of the “Schmittian ‘h-word’” especially given the association of Schmitt’s concept of substantive homogeneity with the Nazi *Volksgemeinschaft*.⁴² Böckenförde’s

³⁹ Böckenförde, *Kirche und christlicher Glaube*, 14.

⁴⁰ *Ibid.*, 14.

⁴¹ The concept of homogeneity is ubiquitous in Schmitt’s work. While in his 1928 magnum opus *Constitutional Theory* Schmitt maintained that “the quality of belonging to a [particular] people can be defined by very different elements (ideas of common race, belief, common destiny, and tradition),” in the preface to *The Crisis of Parliamentary Democracy*, Schmitt spoke specifically of “national homogeneity.” By 1933, Schmitt explicitly endorsed National Socialism and the “racial homogeneity of the united German Volk.” The quotations can be found respectively in Carl Schmitt, *Constitutional Theory*, trans. Jeffrey Seitzer (Durham, 2008), 258; Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. Ellen Kennedy (Cambridge, 1985), 9 and Carl Schmitt, *Staat, Bewegung, Volk. Die Dreigliederung der politischen Einheit* (Hamburg, 1933) cited by Richard Wolin, “Carl Schmitt, political existentialism, and the total state,” *Theory and Society* 19 (1990), 389–416.

⁴² I borrow this expression from Jan-Werner Müller, *Constitutional Patriotism* (Princeton, 2007), 85.

conceptualisation of homogeneity, however, places him in a tradition of social democratic legal intellectuals.⁴³

In 1957 Böckenförde distinguished “homogeneity” from his own conception of the substantive unity undergirding liberal democracy. While “homogeneity” appears to describe an already given unity of contents, the vocabulary Böckenförde uses to designate his own conception of substantive democracy —“ethos,” “partnership,” “trust”— emphasizes attitudes and relationships rather than fixed contents or normative positions. The existential foundation of modern democracy, in Böckenförde’s 1957 writings, is not the Schmittian distinction between friend and enemy that reasserts the homogeneity of the *Volk*, but rather the possibility of “trust.”⁴⁴

It is only in 1969 that Böckenförde uses the term “homogeneity” in a more explicitly positive manner. It is noteworthy, however, that Böckenförde does not refer to Schmitt, but rather to Adolf Arndt to support his assertion. Arndt’s idea that “voting as a form of developing political objectives and shaping laws presupposes agreement as to what cannot be voted on [...] is undoubtedly true,” Böckenförde wrote. “The question, however, is whether that *consensus*, which a body politic cannot do without, must not be *presupposed*.” Almost in the same breath, Böckenförde defines the “homogeneity of society” as the “consensus” on a society’s “‘basic values’ of its way of life and its political organization.”⁴⁵ The state, Böckenförde adds, cannot exist nor persist solely by guaranteeing constitutional liberties. It needs a “unifying bond, a force reasserting the homogeneity that presupposes this freedom and that sustains the state as a political unity.”⁴⁶ The demise of the Weimar Republic, we read in the ultimate footnote of the text, can in fact be attributed to a “lack of political homogeneity and democratic loyalty.”⁴⁷ Homogeneity, in this context, seems to be used as a concept that seeks to describe the existence of a political culture supported by a sufficiently broad spectrum of the population.⁴⁸ In order for a democracy to survive, it must be supported by a sufficiently robust democratic culture, by democrats by heart. Thus, the Weimar Republic failed, not because of the defenselessness of abstract legal formalism as Schmitt maintained, but rather because the republican character of the polity remained deeply contested.

⁴³ In fact, Böckenförde explicitly rejected the Schmittian conceptualization of homogeneity. In 1961, for example, he explicitly cited Schmitt’s *Staat, Bewegung, Volk* as one instantiation of attempts to remedy to the “‘democratic formalism’ of Weimar” and the “‘abstractness and emptiness of the Rechtsstaat’” with “‘organic-holistic and substantive’” solutions which he himself strongly rejects. See Böckenförde, *Kirche und christlicher Glaube*, 130-1, especially footnote 45.

⁴⁴ *Ibid.*, 41-2.

⁴⁵ Böckenförde, *Recht, Staat, Freiheit*, 167.

⁴⁶ *Ibid.*, 169.

⁴⁷ *Ibid.* The footnote has been removed from the current english translation of the text.

⁴⁸ Müller, *Dangerous Mind*, 73.

It is noteworthy that the concept of homogeneity progressively acquired a more positive connotation in Böckenförde's writings only after he had become acquainted with the works of Hermann Heller in 1961.⁴⁹ It is not surprising then that when Böckenförde finally attempts to provide a more precise definition of the notion of homogeneity he draws heavily and explicitly on Heller's interwar writings on political and social homogeneity. "In order to subsist as such, political democracy," Böckenförde maintained in an article originally published in 1987, "necessarily presupposes a certain degree of shared basic convictions" among the citizens of a polity concerning the "mode and order of their coexistence" as well as "the absence of extreme socio-economic differences."⁵⁰ Such a minimal degree of homogeneity would ensure that democratic pluralism does not disaggregate the political unity of the state into "irreconcilable differences."⁵¹ This "relative homogeneity," Böckenförde explained following almost word for word Heller's definition, consists in "a social-psychological state in which the existing political, economic, social and cultural antagonisms and interests appear to be bound to a self-actualizing common will through a we-consciousness."⁵² The content and the sources of this homogeneity, Böckenförde insisted, could vary. It could originate, for instance, from "ethnic cultural particularity and tradition," a shared political history, a common religion or shared national sentiments.⁵³

It would be wrong to dismiss Böckenförde's reliance on Heller as a rhetorical strategy to aimed at rescuing homogeneity from its association with German antiliberalism, particularly that of Schmitt, a persona non grata in postwar German academia. Indeed, Böckenförde did not shy away from citing the works of the "enemy of the *Rechtsstaat*" and he has always been very forthcoming about his friendship with Schmitt.⁵⁴ As we have seen, however, in his earlier writings Böckenförde formulated what he would only later call "relative homogeneity" in reaction against the main tenets of Schmitt's political and legal theory: its antiliberalism and antipositivism. In recent years, Böckenförde particularly emphasized his intellectual kinship to both Heller and

⁴⁹ According to a letter Böckenförde wrote to Roman Schnurr in 1961. See: Günther, *Denken vom Staat her*, 153.

⁵⁰ Böckenförde, *Staat, Verfassung, Demokratie*, 348. Böckenförde's extension of the concept of homogeneity to encompass a minimal degree of socio-economic equality is directly borrowed from Heller and echoes the tradition of social state theory inaugurated by Lorenz von Stein. Compare: Monod, "Homogénéité," 114. For some of Böckenförde's writings on the *Sozialstaat* see: Böckenförde, *Recht, Staat, Freiheit*, 170-243. For a synthetic overview see: Hermann-Josef Große Kracht, "Freiheitliche Kapitalismuskritik und der Etatismus der sozialen Demokratie," in Große Kracht, eds. *Religion — Recht — Republik*, 91-119.

⁵¹ Böckenförde, *Staat, Verfassung, Demokratie*, 348.

⁵² Ibid. For the English version of the passage of Heller's text that Böckenförde draws upon see: Heller, *Political Democracy and Social Homogeneity*, 261.

⁵³ Böckenförde, *Staat, Verfassung, Demokratie*, 349-50.

⁵⁴ Letter from Böckenförde to Schmitt dated October 24, 1957, Düsseldorf, Nachlass Carl Schmitt, RW265, 1569-1659. In his letter to Schmitt, Böckenförde wrote that he wished he could have cited Schmitt's works more frequently in his 1957 essay, but for editorial reasons he cited it only once, but "at the most crucial point."

Arndt.⁵⁵ Moreover, he has been cautious to remind his readers that the notion of a “relative homogeneity” needed to be taken with a grain of salt: the most crucial term, Böckenförde insisted in 2012, is not “homogeneity” but rather “relative.”⁵⁶ Homogeneity is always relative in that its content and even its source are not foreordained. Although it has a stabilizing function, homogeneity is not static, it does not comprise an eternally valid essence; rather, it is always historically constructed and contingent and thus always remains potentially open to revision. It is characteristic of Böckenförde’s intellectual style that he embraces its resistance to clear theorization. This attitude places him in a lineage of heterodox thinkers like Arndt and Heller, but also Joachim Ritter, who were concerned with the aporias of the liberal democratic order but regarded attempts to cure its fragility with deep skepticism.⁵⁷ They proposed pragmatic ways to stabilize and reduce the effects of the tension at the heart of liberal democracy rather than utopian attempts to permanently resolve it. The substantive foundations in which they sought to anchor liberal democracy, “is not the sort of which those seeking certainty have in mind. It is a foundation which shifts and evolves, bit by bit moving its structure along with it.”⁵⁸

Because it is relative, historically contingent and must always remain open to revision, the homogeneity that undergirds a liberal democratic polity, Böckenförde maintained in 1969, cannot be “created or sustained by a constitutional or legal ruling.”⁵⁹ The democratic ethos, however, can and must be nurtured. In fact, in 1957 Böckenförde even maintained that “the ethos of partnership” remained something that most Germans still needed to learn. Only then would it be possible to “anchor democracy in the political consciousness of the people.”⁶⁰ Böckenförde’s first intervention as a public intellectual with his 1957 *Hochland* essay was therefore motivated by serious concern that the Federal Republic was not yet sufficiently supported by a genuine democratic political culture. In the German Catholic milieu especially, Böckenförde thought that a conversion to the ethos of democracy had become urgent. The rhetoric deployed by leading Christian Democrats and representatives of the Churches alike, however, were hampering this development.⁶¹ In the context of pre-Vatican II Roman Catholicism, Böckenförde aimed to

⁵⁵ See Böckenförde, *Wissenschaft, Politik, Verfassungsgericht*, especially at 378 and 477.

⁵⁶ *Ibid.*, 477.

⁵⁷ For Böckenförde’s own appreciation of Ritter’s scholarly temperament see: Böckenförde, *Wissenschaft, Politik, Verfassungsgericht*, 352.

⁵⁸ David Dyzenhaus writes this about Heller, though it can be extended to Ritter, Arndt and Böckenförde as well. See Dyzenhaus, *Legality and Legitimacy*, 166.

⁵⁹ Böckenförde, *Recht, Staat, Freiheit*, 167.

⁶⁰ Letter from Ernst-Wolfgang Böckenförde to Adolf Arndt, dated November 24, 1957. Bundesarchiv Koblenz. N1538 Box 636.

⁶¹ This concern is omnipresent in Böckenförde’s private correspondence of that time. In a letter to Franz-Josef Schöningh dated June 4, 1957 Böckenförde finds deeply alarming the way in which the Churches and Christians “toy with our still fragile democracy.” Bundesarchiv Koblenz. N1538 Box 636. Böckenförde also elucidates what disturbed

convince German Catholics that they need not mourn the absence of a political order grounded in the supposedly more robust moral foundations of Christian natural law nor long for a Christian state.⁶² Instead, Böckenförde maintained, Christians could positively endorse liberal democracy and the principle of religious freedom, in that it is fully compatible—and possibly even derived from—Christianity. “The structural ethos of democracy” Böckenförde maintained, cannot be simply dismissed as frail value-relativism. The “unconditional recognition of fellow human beings as persons, [and] an ethos of personal partnership extending to the social-political [realm]” were indeed congruent with the Christian values of mutual respect and solidarity.⁶³ Franz-Josef Schöningh, one of the editors of *Hochland*, repeatedly pressured Böckenförde to draw more explicit connections to contemporary political affairs. After reading a first draft of Böckenförde’s essay, Schöningh urged him to let go of the “modesty of the debutant” and to write in a more self-assured tone.⁶⁴ Schöningh also wanted to send copies of the essay to all members of federal and state legislatures. Böckenförde, however, was adamant that his essay not be polemical and resisted his editors’ pressures to politicize his text. If he did so Böckenförde feared that the Catholic community would feel antagonized and thereby refuse to thoroughly engage with its key insights.⁶⁵

GERMAN POLITICAL CATHOLICISM FROM 1933 TO 1961

Although Böckenförde wanted to avoid antagonizing German Catholics, in 1961 he published an article on “German Catholicism in the Year 1933” that provoked an important polemic in the Federal Republic.⁶⁶ In fact, after reading the manuscript, Schmitt wagered that the

him about German Catholicism’s attitude towards the state in Böckenförde, *Wissenschaft, Politik, Verfassungsgericht*, 393-4.

⁶² This had become especially urgent in the Federal Republic of the mid-1950s when the Federal Constitutional Court examined the validity of the *Reichskonkordat* signed between Hitler and the Holy See in 1933 and its implications for state education legislation. At the same time, new sources documenting the concordat negotiations between the German clerical elite, the Vatican and Hitler were unsealed and led to the publication of several historical studies. Böckenförde was deeply appalled by the defensive and uncritical reactions Bishop Keller and the Catholic elite to these revelations, reprinted for instance in: Böggering, ed., *Iter para tutum*, 31. On the debate about the concordat in the Federal Republic see: Konrad Repgen, “Der Konkordatsstreit der fünfziger Jahre: Von Bonn nach Karlsruhe (1949-1955/57),” *Kirchliche Zeitgeschichte* 3 (1990), 201-45 and Mark Edward Ruff, “Clarifying Present and Past: The Reichskonkordat and Drawing Lines between Church and State in the Adenauer Era,” *Schweizerische Zeitschrift für Religions- und Kulturgeschichte*, 106 (2012), 257-280.

⁶³ Böckenförde, *Kirche und christlicher Glaube*, 20.

⁶⁴ Letter from Franz-Josef Schöningh to Ernst-Wolfgang Böckenförde, dated July 16, 1957. Bundesarchiv Koblenz. N1538 Box 636.

⁶⁵ Letters from Ernst-Wolfgang Böckenförde to Franz-Josef Schöningh dated October 17, 1957 and November 6, 1957. Bundesarchiv Koblenz. N1538 Box 636.

⁶⁶ Ernst-Wolfgang Böckenförde, “Der deutsche Katholizismus im Jahre 1933: Eine kritische Betrachtung,” *Hochland* 53 (1961), 215-239 reprinted (among other places) in Böckenförde, *Kirche und christlicher Glaube*. A partial English translation was immediately published: Ernst-Wolfgang Böckenförde, “German Catholicism in 1933,” trans. Raymond Schmandt *Cross Currents* 11 (1961), 283-303. Unless otherwise indicated, translations are my own.

article would certainly be rejected.⁶⁷ In this article, Böckenförde devoted more serious attention to an idea that he had briefly touched upon in his 1957 essay and that has since been referred to as his *AffinitätsThese*: the idea that there might have been an ideological affinity between the Roman Catholic Church and authoritarian regimes purportedly based on Christian foundations.⁶⁸ In 1961, newly published sources documenting the relation between the Catholic leadership and the NSDAP seemed to corroborate Böckenförde's intuitions. The vigorous denial of their implications by the Christian conservative political majority and the clerical elite convinced Böckenförde that a truthful engagement with "what *actually* happened in 1933" had become urgent.⁶⁹

The (unintended) polemical dimension of Böckenförde's article might have resided in its implications for the dominant Christian Democratic ideology. Indeed, as Maria Mitchell has shown, the CDU's ideology rested on a particular story about the German past. In the early Federal Republic, the CDU developed a Manichean conception of history that depicted the past several centuries of political history in the West as a great struggle between an oppressive materialist secularism and a humanistic Christian culture. According to this narrative, it was not the widespread Christian conservative disdain for liberal democracy, Jews and the legacy of the French Revolution that constituted a "fertile ground" in which Nazism was able to take root. Rather, it was secularism, positivism, value-neutrality and socialism that were responsible for the German catastrophe.⁷⁰

Remembering National Socialism as the product of a centennial anti-Christian force provided a narrative of Nazism that did not turn into a general indictment of the complicity of German conservatism and of the German professional and governmental elite. In fact, casting National Socialism as a direct consequence of secular materialism allowed Adenauer to deflect responsibility of Christian conservatives and present the CDU as a party, not of former Nazis, but of former victims and resistance.⁷¹ This narrative allowed the CDU to cast itself as uniquely capable of preventing another 1933 disaster by providing substantive grounds in which to enroot the newly founded democratic polity.

⁶⁷ Böckenförde, *Wissenschaft, Politik, Verfassungsgericht*, 363. The fact that Franz Josef Schöningh, one of the chief editors of *Hochland*, was related to Böckenförde may have helped. While Böckenförde addressed his first letters to Schöningh in 1957 with the very formal "Sehr verehrter Herr Dr. Schöningh," by 1960, his letters usually started with "Lieber Onkel." Bundesarchiv Koblenz. N1538 Box 636.

⁶⁸ See Böckenförde, *Kirche und Glaube*, 24.

⁶⁹ For an in-depth contextual analysis of this see Mark Edward Ruff, "Böckenförde und die Auseinandersetzung um den deutschen Katholizismus," in Große Kracht eds., *Religion, Recht, Republik*, 41-76.

⁷⁰ See Jeffrey Herf, "Multiple Restorations: German Political Traditions and the Interpretation of Nazism, 1945-1946," *Central European History* 26, (1993), 21-55; Maria Mitchell, "Materialism and Secularism, CDU Politicians and National Socialism, 1945-1949," *The Journal of Modern History*, 67 (1995).

⁷¹ Norbert Frei has documented at great length the degree of continuity in personnel between the Federal Republic and the Nazi regime in his work *Adenauer's Germany and the Nazi Past: The Politics of Amnesty and Integration* (New York, 2002).

Böckenförde also struck a sensitive nerve in Adenauer's Germany because he explicitly questioned the long-held view that German Catholics had not only been the victims of National Socialism and but also its staunchest opponents. The Center Party's negotiation of the Enabling Act with Hitler may not have been a secret in 1960, but throughout the Adenauer Era, the Catholic acquiescence to Nazi rule was remembered as the work of a small clerical elite, at best committing an honest mistake in an age of tremendous uncertainty, and at worst jealously guarding its territory and privileges. According to this narrative, the Center Party leadership had simply been duped by Hitler's glowing promises.⁷² This interpretation was supported by the well-documented existence of a strong Catholic resistance to National Socialism in the subsequent years of the Hitler regime.⁷³

Böckenförde, a devout Catholic himself, did not intend to downplay the importance of this later Catholic resistance nor to embark on an anticlerical witch-hunt. However, he believed that there was more to the short-lived cooperation between German Catholics and Hitler than mere naïveté, opportunism, or a response to the perceived moral and social breakdown of modern society.⁷⁴ In Böckenförde's view, one could not explain away the German Catholic elite's cooperation with Hitler by simply blaming the irresistible forces of economic, political and social pressures. Examining speeches, conference reports, pastoral letters, publications in Christian journals, diaries and correspondence of the then clerical and political leadership, Böckenförde noted that the Catholic endorsement of National Socialism in the spring of 1933 had been as "ideologically motivated" and justified as may have been the Catholic opposition to Nazism before and after 1933. Böckenförde therefore urged his contemporaries to uncover "the *intrinsic* reasons for the 'disposition' of German Catholicism towards the National Socialist government in 1933."⁷⁵ More than an overlap in interests, there must have been an ideological affinity between political Catholicism and National Socialism that had drawn the Church into the arms of the Nazis in the spring of 1933.

Böckenförde thus set out to conduct an intellectual genealogy of Catholic political thought in Germany. The peculiar disposition that sparked a short-lived romance between Catholicism and National Socialism, Böckenförde concluded, could be attributed to three interrelated factors: the *Kulturkampf*, the Church's ahistorical conception of natural law, and a widespread hostility to

⁷² For an assessment of the role of the Reichskonkordat negotiations and the Center Party's signing of the Enabling Act in the immediate postwar, see: Wilhelm Bertrams, "Zur Geschichte und Bedeutung der Konkordate," *Stimmen Der Zeit*, 72 (1946).

⁷³ For example: Heinrich Hermelink, *Kirche im Kampf* (Tübingen, 1950); Wolfgang Frühwald and Heinz Hürten eds., *Christliches Exil und christlicher Widerstand* (Regensburg, 1985).

⁷⁴ Böckenförde clarified this argument in a response to his critics: Ernst-Wolfgang Böckenförde, "Der deutsche Katholizismus im Jahre 1933. Stellungnahme zu einer Diskussion," *Hochland* (1962) reprinted in: Böckenförde, *Kirche und christlicher Glaube*, 153.

⁷⁵ Böckenförde, "German Catholicism," 296-7.

political liberalism. Indeed, the experience of the *Kulturkampf* had exacerbated preexisting tensions between Catholicism and modernity. German Catholics identified the institutions of the modern state with the Prussian Protestant oppressor and therefore withdrew from them, mediating their relationship to the state and to politics through the Church. The Catholic Church's commitment to an ahistorical doctrine of natural law, especially since Pope Leo XIII, accentuated this situation. The natural law theory of the state was grounded in a distinction between "the supra-historical natural law principles of political order, and the concrete political and constitutional forms that are independent of natural law and are the result of (mere) historical contingency."⁷⁶ This distinction had two important consequences. First, it meant that historically contingent political forms had no normative worth in the eyes of Catholics. Second, the areas which supposedly entertained a special relation to natural law—the Church, religion and education—were elevated "above all other areas" so as to make them unavailable for political compromise.⁷⁷ In Böckenförde's view, it then becomes clearer why, when Hitler guaranteed that the Churches would retain their institutional privileges, especially control over education, and when the prospect of a Concordat with the Holy See became apparent, the Center party delegates were ready to approve the Enabling Act and the German Bishops to retract their initial warnings against the NSDAP.⁷⁸ The fact that it was "the substance of the democratic-parliamentary state" that was at stake, mattered little for the political agenda of German Catholicism. Its priority was to achieve a Christian state, whether this state was of a democratic or authoritarian kind played little role.⁷⁹ This historical example seemed to validate Arndt's words.

The third and most potent factor that led to a widespread Catholic support of National Socialism in the spring of 1933 was a deep-rooted Catholic anti-liberalism. Its origins, Böckenförde argued, were to be found in Catholicism's allergic reaction to the "ideas of 1789." The roots of Catholic anti-liberalism, however, did not lie in Catholicism itself, but rather in the Church's attempt to provide a counter-model to the individualised and autonomous social order heralded by the Enlightenment and enacted by the French revolutionaries. Catholic political thought thus

⁷⁶ Böckenförde, *Kirche und christlicher Glaube*, 137.

⁷⁷ Böckenförde already deplored the persistence of this mindset in his 1957 essay. See Böckenförde, *Kirche und christlicher Glaube*, 23-4. Yet, the fact that Bishop Michael Keller was unable to rally the German episcopate to his call for a Catholic rejection of the Basic Law in 1949 because it failed to guarantee confessional schools invites us to relativize Böckenförde's claim.

⁷⁸ Again, this argument must be treated with caution. Recent scholarship in the field is still divided on this issue. See : Larry Eugene Jones, "Franz Von Papen, Catholic Conservatives, and the Establishment of the Third Reich, 1933–1934," *The Journal of Modern History* 83 (2011), 272–318; Larry Eugene Jones, "Franz Von Papen, the German Center Party, and the Failure of Catholic Conservatism in the Weimar Republic," *Central European History* 38 (2005), 191–217; William Patch, "The Catholic Church, the Third Reich, and the Origins of the Cold War: On the Utility and Limitations of Historical Evidence," *The Journal of Modern History* 82, (2010), 396–433.

⁷⁹ Böckenförde, *Kirche und christlicher Glaube*, 118, 137.

developed “the theory of the ‘organic’ order holding to ‘realities established by nature,’ based on authority, a genuine community, and a class structure.” The purpose of this organic theory was to preserve or restore “the pre-revolutionary and pre-liberal kind of life.”⁸⁰ But Catholicism’s inability to reconcile with the principles of 1789 had disastrous consequences for the ideas undergirding the French Revolution had drastically transformed political reality as such: 1789 marked the advent of the modern state, whose legitimacy no longer derived from a divinely ordained ruler, but rather from its capacity to successfully guarantee freedom, peace and security to each of its citizens. If individual freedom, and especially, freedom of conscience, became the cornerstone of modern politics, then the state could no longer claim its legitimacy in a political theology. Catholic political thought, however, refused to recognise the irrevocability of these changes. Therefore, by 1933, “Catholic political thought [...] was living off principles that denied at least two hundred years of historical development.” Böckenförde pointed out that “when one stands in opposition to two hundred years of historical development and of historical irrevocability, one cannot at the same time play at practical politics and hope to accomplish anything, since practical politics cannot evade historical facts. That must lead to illusions or to catastrophe.” In sum, because of Catholicism’s inability to accept the transformations of political modernity it was compelled to become “more and more ideological and abstract.”⁸¹ It was this anti-liberal disposition that provided the determining ingredient for the flourishing of an elective affinity between Catholicism and National Socialism.

Notwithstanding the historical accuracy of his reasoning, Böckenförde’s intervention is significant as it signals a central feature of his intellectual project: his own unambiguous commitment to liberal democracy.⁸² Skeptical of grand theories and neat formulas, rejecting any form of ideological dogmatism, Böckenförde’s work is marked by intellectual rigour and humility. His investigation of German Catholicism’s complicity with National Socialism was not the work of a young scholar embarking on an iconoclastic battle against his forbears. Böckenförde was well aware that he was merely “blessed by late birth;”⁸³ and therefore refrained from adopting any moralising stance.⁸⁴ In order for German Catholics to come to terms with liberal democracy,

⁸⁰ Ibid., 139-40.

⁸¹ Ibid.

⁸² On the reactions against Böckenförde’s text, see: Ruff, “Böckenförde und die Auseinandersetzung,” 33-68.

⁸³ The expression “Gnade der späten Geburt” was coined by the journalist Günter Gaus and famously popularized by Chancellor Helmut Kohl in 1983-84. See: “Späte Geburt” *Der Spiegel* 36, September 5, 1983. Accessed June 24, 2014. <http://www.spiegel.de/spiegel/print/d-14018745.html>. Böckenförde explicitly refers to this expression in the preface to his 1957 article in: Böckenförde, *Kirche und christlicher Glaube*, 7-8.

⁸⁴ In a public address held in front of students in East Berlin in May 1965, Böckenförde reiterated some of his arguments on German Catholicism’s complicity with National Socialism. Implicit in his remarks, was a reflection on the possibility to exhibit a genuinely Christian comportment in the GDR. In his closing remarks, however,

however, Böckenförde first needed to dismantle the historical lie of Catholicism's ideological incompatibility with National Socialism. It is Böckenförde's commitment to the formalism of liberal democracy that made the problem of its inherent fragility more intractable for him: any attempts to simply infuse substance into liberal democracy inevitably end up weakening it by contradicting its principles.

THE PLACE OF RELIGION IN MODERN DEMOCRACY

We are now better prepared to assess the meaning of the dictum and to understand the role Böckenförde ascribes to religion in a liberal democratic order. By highlighting the inherent aporia of the liberal secularised state, the dictum does not condemn its inexorable weakness, it merely asserts its fragility. It would be wrong to conclude that the dictum suggests it might be possible to solve this aporia by grounding secular democracy in its Christian foundations, as if it were possible to reactivate, by fiat, the Christian values out of which the modern secular state originated.⁸⁵ Indeed, one of the hallmarks of Böckenförde's thought, which he shared with Ritter, is precisely that resolution is neither possible nor desirable.⁸⁶ In his early writings he emphasised the *compatibility* of Christian faith with merely proceduralist secular democracy not because he saw proceduralism as insufficient, but precisely because he extolled the ethics embedded in the abstract formalism of democratic procedures. In this respect, Böckenförde's thought appears again to depart from that of Schmitt. Indeed, Böckenförde's goal was not to show that the modern liberal state operates according to a structure inherited from Catholicism and thereby to expose the fraught and unsustainable character of parliamentary democracy.⁸⁷ Instead, Böckenförde continually insisted on the structural peculiarity of the modern liberal and democratic state: on the

Böckenförde cautioned his young audience against any moralising arrogance: "It is not easy to be Christian in such times and no one is immune from incurring guilt." In German: "Christ sein in solcher Zeit ist nicht leicht, und niemand ist davor gefreit, selbst schuldig zu werden." Note that the German "schuldig" denotes both blame and guilt. Böckenförde, "Formen christlichen Weltverhaltens während der NS-Herrschaft," in Böckenförde, *Kirche und christlicher Glaube*, 181-190, at 190.

⁸⁵ As is for instance the position defended by Cardinal Ratzinger. See: Habermas and Ratzinger, *The Dialectics of Secularization*. For an insight into the private correspondence between Ratzinger and Böckenförde on this theme see: Böckenförde, *Der säkularisierte Staat*, 32-6.

⁸⁶ On Ritter's influence on Böckenförde see Aline-Florence Manent, "The Intellectual Origins of the German Model: Rethinking Democracy in the Bonn Republic" (PhD diss., Harvard University, 2016).

⁸⁷ Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago, 2005). My argument might be contrasted with Reinhard Mehring's interpretation which emphasises instead the similarities between Schmitt and Böckenförde's political theologies. See: Mehring, "Zu den neu gesammelten Schriften." More recently, Mehring provided a more balanced account in: Reinhard Mehring, "Politische Theologie oder Staatskirchenrecht? Der engagierte Laie in der Nähe und Differenz zu Carl Schmitt," in Mehring and Martin, eds., *Voraussetzungen und Garantien des Staates*, 90-107.

one hand it is dependent on the existence of a certain degree of unity that allows for a pre-political consensus on “that which cannot be voted upon;” on the other hand, the state cannot guarantee nor forcibly secure the prepolitical unity on which it relies without also contradicting itself as a genuinely liberal, democratic and pluralist polity. It is the persistence of this tension, not its resolution, that constitutes the structural essence of the modern secular democratic order. Moreover, it was Ritter (not Schmitt) who formulated the paradox captured in the dictum. “It is astonishing how much Prof. Ritter sees the problems that a jurist has to grapple with,” Böckenförde wrote Schmitt in 1959. “His thesis was that the law necessarily presupposes substances that it depends on, which it is not capable of determining or generating out of itself.”⁸⁸ The parallelism between Ritter’s remarks and Böckenförde’s later dictum is so striking here that it would be wrong to dismiss it as merely fortuitous. Indeed, Ritter insisted on the paradoxical nature of political modernity in many of his writings.⁸⁹

As we have seen, for Böckenförde, the prepolitical unity that ensures that the polity is supported by an ethico-political substance and not merely competing individual interests *can* originate from religion. Böckenförde insists, however, that this is neither solely nor necessarily the case. Religion and freedom of religion in the modern liberal democratic state are but a paradigmatic example of the structure of political modernity.⁹⁰ Other normative foundations for our co-existence in a liberal and democratic polity can for example come from a shared culture, “common intellectual and ethical conceptions, or inherited traditions.”⁹¹ These are submitted to the same logic as religion in that they are understood to be the distant progenitors of the fundamental liberties constitutionally guaranteed by the modern state, yet the state cannot guarantee the perdurance of a culture that values these liberties.⁹² The state, however, can and should create the *conditions* necessary to *foster* its persistence. This duty does not solely extend to religion. Indeed, like Ritter, Böckenförde also insists on the state’s duty to create the conditions for active and effective citizenship.⁹³ This involves for instance a duty to provide equal access to education and information. But it also involves a duty to create the *social conditions* required for the effective use

⁸⁸ Letter from Ernst-Wolfgang Böckenförde to Carl Schmitt, dated February 1, 1959. Landesarchiv Düsseldorf, Carl Schmitt Nachlass, RW 265-1642.

⁸⁹ See Aline-Florence Manent, “In der Bundesrepublik zu Hause sein. Joachim Ritter und die politische Philosophie der Stabilität,” in Ulrich von Bülow and Mark Schweda, eds., *Entzweite Moderne. Zur Aktualität der Ritter Schule* (Göttingen: Wallstein, 2017).

⁹⁰ Böckenförde himself speaks of religion as merely a paradigm. See: Böckenförde, “Der freiheitliche säkularisierte Staat...” in ‘*Um der Freiheit willen...*’ *Kirche und Staat im 21. Jahrhundert. Festschrift für Burkhard Reichert*,” Susanna Schmidt and Michael Wedell, eds. (Freiburg im Breisgau, 2002), 19-24.

⁹¹ Ibid., 20.

⁹² Böckenförde deploys a structurally similar argument in the context of the German debates on abortion: “Das Recht kann auch hier nicht allein aus seiner Erzwingbarkeit leben.” Böckenförde, *Staat, Nation, Europa*, 227.

⁹³ See: Ritter, *Metaphysik und Politik*, 101.

of one's political freedom.⁹⁴ Similarly, Böckenförde maintains that the modern secular state has a duty to secure the conditions for the exercise of one's religious freedom.

It is crucial to pay attention to the context of Böckenförde's texts on religion in order to not distort his arguments. Indeed, it is only when Böckenförde writes for a conservative Christian audience that he insists on the Christian historical origins of the modern state or the theological origins of modern political principles. To those who thought that the principles undergirding the legitimacy of the modern state—individual freedom and equality—were overly abstract and materialist, Böckenförde emphasised their congruence with Christian principles such as the free subjectivity of the believer and the equality of all in the eyes of God.⁹⁵ In 1957, Böckenförde urged Christians to “take modern democracy seriously” and even suggested that loyalty to the ethos of democracy would make Christians “more faithful.”⁹⁶ In a 1965 essay written as “thoughts of a jurist concerning the discussions of the Second Vatican Council” Böckenförde argued that religious freedom was a “Christian duty” insofar as it constituted a “reconciliation between truth and freedom[...]. Religious freedom does not exist as a right against truth, but rather for the sake of truth,” for one is not free because one already holds the truth but rather, so that one can strive towards it.⁹⁷ In fact, following Ritter's Hegel, Böckenförde wondered in his 1964 essay whether the emergence of the modern secular state did not “realize a principle of politico-social order that in essence corresponds to the substance of the Christian revelation but needed to assert itself against the institutionalised powers of Christianity?”⁹⁸ It is only when he addressed the more limited audience of German Catholics, however, that Böckenförde suggested that the Christian origins of the modern liberal state could provide an argument for the validity of its institutions. As we have seen, however, he repeatedly fustigated the stronger version of this claim according to which, in order to be a good democrat, one necessarily must be a Christian.⁹⁹ Böckenförde's emphasis on the Christian genealogy of secular democracy should therefore not be read as an argument for the failures of secular politics but rather, as an attempt to persuade fellow Catholics of its promise, so that they see the modern secular state “not as something foreign and hostile to their faith,” but as their own.¹⁰⁰

⁹⁴ Böckenförde develops this in several articles reprinted in Böckenförde, *Recht, Staat, Freiheit*, 143-243 and Böckenförde, *Wissenschaft, Politik, Verfassungsgericht*, 53-83.

⁹⁵ Böckenförde, “Religionsfreiheit als Aufgabe der Christen” in *Kirche und christlicher Glaube*, 197-212.

⁹⁶ *Ibid.*, 21.

⁹⁷ *Ibid.*, 211-12.

⁹⁸ *Ibid.*, 227.

⁹⁹ The question of the relation between Christianity and German (or, in recent years, European) identity, however, is far more restricted in Böckenförde's later writings.

¹⁰⁰ Böckenförde, *Recht, Staat, Freiheit*, 114.

Indeed, the modern state, for Böckenförde, is a secularised entity, not a militantly atheistic one. Although the state must remain neutral in matters of belief, it must not be hostile towards religion.¹⁰¹ In fact, the state's duty to create the conditions necessary to foster the ethico-political substance which it cannot guarantee affords an important role to the Churches in the modern secular state. Institutions like the Churches provide a much needed "normative support" or compass for the individual's ethical conduct.¹⁰² Their sphere of influence, however, must shift from the state to society: the Churches can no longer exist in a special relationship towards and above the state, they can however be active participants in the pluralist democratic society. On the one hand and on a lesser level, the Church can play an active role in defending a *Weltanschauung* i.e. Christian values and interests, in the public sphere. This is compatible with the structure of the secular state since by "secular," Böckenförde understands that the state cannot rely on any particular religion to justify its legitimacy. In this arrangement, the Church acts as an interest group among others, defending its worldview against competing ones, accepting compliance with the rules of representative and pluralistic politics. The churches are thus just another interest group competing for political influence in order to determine the contents of the laws that rule our social life so that they be in accordance with their interests. Such an arrangement does not require any philosophical commitment to secular democracy, it merely requires an acceptance of its formal procedures.¹⁰³ Far from strengthening the political and social impact of religion, however, this arrangement binds religious efficacy to fluctuating electoral majorities. In Adenauer's Federal Republic, Böckenförde deplored the political alliance between the Churches and the CDU, not only for its missed opportunities, but also for its anti-pluralist logic. Indeed, neither the Church nor the Christian Democratic political establishment had yet positively endorsed the principle of state neutrality towards religious questions, thereby operating in a similar fashion as had the Center

¹⁰¹ Böckenförde therefore distinguishes between two forms of state neutrality in matters of religion: on the one hand, a "distanzierende Neutralität," which relegates religion solely to the private sphere and deems religious matters irrelevant for politics. This is the model adopted by the French state since the 1905 law on the separation of state and church and has led to a "laizistischen Staat." On the other hand, Böckenförde maintains that a more tolerant form of state-neutrality as "übergreifende offene Neutralität" leads to a truly "secular state" in that it allows its citizens to intervene in the public sphere without bracketing-off their cultural and religious identities. The two neutrality concepts are developed in a legal opinion Böckenförde wrote in 1970. See: Ernst-Wolfgang Böckenförde, "Kreuze (Kruzifixe) in Gerichtssälen? Zum Verhältnis von staatlicher Selbstdarstellung und religiös weltanschaulicher Neutralität des Staates," *Zeitschrift für evangelisches Kirchenrecht* (1975), 119-147, at 130-32. The distinction is later taken up in: Böckenförde, *Der säkularisierte Staat*, 11-16. Also see: Böckenförde, "Religion im säkularen Staat," in Böckenförde, *Kirche und christlicher Glaube*, 425-437 and Böckenförde, "Bekenntnisfreiheit in einer pluralen Gesellschaft und die Neutralitätspflicht des Staates," in *Ibid.*, 439-455.

¹⁰² Böckenförde, "The State as Ethical State," in *Constitutional and Political Theory* (OUP, 2017), 86-107, at 103. "The intellectual and moral life....needs anchoring points, institutional expressions and normative supports, places where the general intellectual and moral attitudes that exist can attach themselves, achieve public relevance, and find backing and confirmation vis-à-vis the individualist-functionalist impulses of an acquisitive and meritocratic society."

¹⁰³ Böckenförde, *Kirche und christlicher Glaube*, 23.

Party in 1933. In the concluding remarks of his 1961 article, Böckenförde pointed to this worrisome parallel:

It seems that German Catholicism has today assimilated itself to society with just as few reservations as it had in 1933 in serving the State against society; in doing this it has again missed the just mean, but from the opposite side. Or can it be said in earnest that the attitudes and political principles that led to the mistakes of 1933 have been overcome in today's German Catholicism?¹⁰⁴

The role Böckenförde affords to religion in a secular democracy rests on his insistence on the separation between state and society and is reminiscent of Ritter's work. Ritter insisted that state and society needed to remain separate, yet connected through a web of "ethical institutions."¹⁰⁵ Civic participation provides the substantive ethics of these institutions and binds state and society with a "shared ethical and spiritual substance."¹⁰⁶ Similarly, for Böckenförde, because the state must be secular, the liberal logic of state-society separation opens up a sphere in which religious values can flourish. It is thus in the separate sphere of society that ethical traditions live and support the liberal state. In other words, the liberal state supports itself by allowing (and creating the conditions for) its citizens to actively participate in the political will-formation, bringing their substantive ethical commitments with them. The modern, secular state can rely upon an ethical substance that it cannot itself guarantee insofar as popular participation acts as a conduit for traditionally derived ethics into the liberal state. Indeed, the closing remarks of Böckenförde's 1964 essay suggest that the liberal, secularized state "lives by the inner impulses and bonding forces imparted by the religious faith of its citizens."¹⁰⁷ Thus, for Böckenförde, the modern secular state needs to allow for and accept the possibility for religion—and he emphasizes *any* religion—to influence each individual citizen's participation in the public sphere. The state cannot rely on any particular religion to assert its legitimacy or to define the content of its laws, but it must allow for the persistence of religious influence on the political, through the citizen-believer. This, for Böckenförde, is the necessary condition for a truly tolerant, pluralist and stable state.

In this more desirable arrangement, Böckenförde believes that the Churches retain a crucial function. Their strength, however, depends on their positive endorsement of the democratic ethos. As we have seen, the democratic ethos demands that political actors relinquish claims to absolute truth. Rather than become the allies of one exclusive party, the Churches should

¹⁰⁴ Böckenförde, "German Catholicism," 303.

¹⁰⁵ Ritter, *Metaphysik und Politik*, 104-5. On Ritter's theory of institutions see Hacke, *Philosophie der Bürgerlichkeit*, 161-5.

¹⁰⁶ Joachim Ritter, unpublished drafts titled "Formale Demokratie" and "Kultur 2" in: "Verschiedene Entwürfe und Notizen. Europäisierung. Notizen zu einer Reise nach Bogzuky," Deutsches Literaturarchiv Marbach. Nachlass Joachim Ritter.

¹⁰⁷ Böckenförde, *Recht, Staat, Freiheit*, 113.

thus seek connections across the political spectrum to impart its “religious-ethical impulses” to all political parties.¹⁰⁸ Moreover, if the Churches want to “play at the game of secular politics,” they need to accept their own fallibility.¹⁰⁹ In recent years, Böckenförde went even further, insisting that in a liberal democratic and pluralist society, the Churches can solely retain an “unpolitical political effectiveness,” that is to say that as institutionalized religious communities, the Churches can have an indirect influence over politics but they should not seek political efficacy.¹¹⁰ It is primarily the duty of individual believers to seek to actualize and transpose religious contents into politics.¹¹¹ The Churches can encourage and prepare its members to become active citizens, but it can neither require such a civic commitment nor determine which contents these citizen-believers should bring to bear on their political engagements.¹¹²

Böckenförde’s understanding of the role of religion in a secular state comes to light in his positions on the display of religious symbols in courtrooms and in public schools. The two situations called for distinctive answers. In a 1970 legal opinion commissioned by the *Kommissariat der Katholischen Bischöfe Nordrhein-Westfalens*, Böckenförde conceded that the display of crucifixes in courtrooms could be perceived by individuals as an infringement on their negative freedom of conscience and should therefore immediately be removed upon request.¹¹³ Because of the particular nature of courtrooms as a place where the authority of the state is wielded, the state’s symbolic endorsement of a specific religion over others could be perceived as intimidating and potentially coercive by religious (or atheist) minorities. In courtrooms, the state needed to obey to strict “distancing neutrality” towards religion. Böckenförde, however, did not oppose the practice of school prayers nor the display of crucifixes in public schools insofar as schools are not institutions of the state as an entity of power, but intermediary institutions that connect state and society.¹¹⁴ Indeed, public schools are merely a means through which the state fulfils its duty of civic education, not indoctrination.¹¹⁵ In public schools, therefore, the “open neutrality” applied, whereby the state could and should foster the ethical substance that it relies upon and not reduce

¹⁰⁸ Böckenförde, *Kirche und Glaube*, 24.

¹⁰⁹ Böckenförde, “Politisches Mandat der Kirche,” in *Kirche und christlicher Glaube*, 265.

¹¹⁰ Böckenförde, “Stellung und Bedeutung der Religion in einer Civil Society,” in *Staat, Nation, Europa*, 274.

¹¹¹ See: Ernst-Wolfgang Böckenförde, *Vom Ethos der Juristen* (Berlin, 2010), at 45-6.

¹¹² Ibid.

¹¹³ Böckenförde’s opinion was written in 1970 and presented to the Federal Constitutional Court in its 1973 review of the case BverGE 35, 366. See: Böckenförde, “Kreuze (Kruzifixe) in Gerichtssälen?”

¹¹⁴ Böckenförde speaks of “public schools as an encounter between state and society.” See: Böckenförde, “Bekenntnisfreiheit und Neutralitätspflicht,” in Böckenförde, *Kirche und christlicher Glaube*, 449. On school prayers see: Ernst-Wolfgang Böckenförde, “Religionsfreiheit und öffentliches Schulgebet. Eine Auseinandersetzung mit dem Urteil des Hess. Staatsgerichtshofs vom 27.10.1965,” *Die öffentliche Verwaltung. Zeitschrift für Verwaltungsrecht und Verwaltungspolitik* 19 (1966), 30-38. On the display of crucifixes in public schools see: See: Böckenförde, “Kreuze (Kruzifixe) in Gerichtssälen?” at 127 and 134.

¹¹⁵ Böckenförde, *Der Staat als sittlicher Staat*, 33.

educational goals and contents to the “smallest common denominator.”¹¹⁶ Allowing students and teachers to enter the classroom as “person,” and not solely as “abstract agents stripped of their religious freedom,” belonged to the proper education of autonomous and tolerant citizens.¹¹⁷

Conclusion

The significance of Böckenförde’s intellectual project can be grasped more fully if we recall the dictum for which he became so famous. *“The liberal, secularized state is nourished by presuppositions that it cannot itself guarantee.”* As a student of Carl Schmitt and Joachim Ritter, as an intellectual heir to Hermann Heller (like Adolf Arndt), Böckenförde’s career has been driven by a concern with the question of how a secular liberal constitutional order can be stabilized and secured. He has been deeply influenced by thinkers both on the left and the right who remained skeptical of the self-standing character of liberal democratic orders: Heller with his theory of social and political homogeneity, Ritter with his insistence on the irresolvable tensions at the heart of political modernity, and Schmitt’s political and legal theory. Their works shaped Böckenförde’s career-long search for the sources of sustenance, which the new democratic order could live off. It is therefore hardly surprising that his career largely began with a critique on the all too easy and self-satisfied Christian Democratic understanding of National Socialism as a consequence of secularisation that could be prevented by reasserting the democratic state’s Christian character. This narrative appeared to Böckenförde as an insufficient and shallow attempt to escape the problems announced in his later dictum. It is the historical falsity of this account that explains Böckenförde’s attempt to reopen the questions posed by an older generation of German thinkers such as Carl Schmitt, Hermann Heller or Joachim Ritter – questions of the sort that the Adenauerist narrative aimed to foreclose. As Böckenförde wrote to Adolf Arndt in 1957:

It seems to me that we are doing democracy a disservice when we put too many a priori contents into it[...]. That it remain open to various possible designs—within the framework of mutual partnership—seems to belong to its essence. This implies a certain ‘formality,’ which admittedly also comes with its own perils.¹¹⁸

Perhaps the most distinctive element of Böckenförde’s political and legal thought, therefore, resides foremost in this spirit of uncertainty and humility. This attitude, which extends to Böckenförde’s scholarship, his teaching and his writing styles, is evident in the dictum itself. Indeed, the dictum is not a normative argument articulated with strong critical force (although it

¹¹⁶ Ibid.

¹¹⁷ Böckenförde, “Bekenntnisfreiheit und Neutralitätspflicht,” in Böckenförde, *Kirche und christlicher Glaube*, 449.

¹¹⁸ Letter from Ernst-Wolfgang Böckenförde to Adolf Arndt dated December 15, 1957, Archiv der sozialen Demokratie, Bonn, Adolf Arndt Nachlass, Box 5, folder 13.

is often misread in this manner). Rather, it is an intellectual challenge, a problem posed by a young scholar to a small audience of friends and colleagues gathered in Ebrach. This problem, however, does not necessarily call for a strong answer, a clear political theory or philosophical model to come to resolution. Even when Böckenförde came close to offer some solutions his answers always remained somewhat open-ended if not cryptic, as is evident in the slippery concept of “homogeneity” in his writings or his tendency to voice his own arguments in the form of rhetorical questions. It is thus no accident that Böckenförde’s scholarship consists, for the most part, of meticulously researched and rigorously argued articles and essays published in collected volumes rather than a series of monographs. This sober realism and intellectual humility also explain why Böckenförde never sought to found a school of thought.¹¹⁹ It also exposes the shortcomings of any attempts to extract a philosophical model or a normative democratic theory from Böckenförde’s writings.¹²⁰ Perhaps Böckenförde’s most important insight on the problem of modern secular democracy is to be found in this attitude, rather than in any normative doctrine. This scholarly temperament, as we have seen, connected Böckenförde to Ritter, Arndt and Heller. We might also recall Hans Kelsen’s indictment against competing Marxist and Christian attempts to blend absolutism with democracy in the postwar era. Like Arndt and Böckenförde, Kelsen fustigated the proponents of “democratic theology” who crusaded against “relativistic positivism.” The Church, Kelsen wrote in 1955, “could be ‘the teacher of the totalitarian state in nearly every point’ not because she represented a positivism void of faith and inimical to metaphysics and religion but because she taught just the contrary: the belief in absolute justice.”¹²¹ Democracy, Kelsen argued, is at base a form of political relativism, a repudiation of the Absolute. This pluralist vision of democracy meant that the content of democratic politics could not be determined in advance. Instead, democracy “leaves the decision about the social value to be realized to the individual acting in political reality. It does not and cannot take the burden of this grave responsibility off his shoulders.”¹²² Kelsen was reminding Christian converts to democracy to avoid the fanaticism that so often comes with conversion. In democracy no movement can claim to be the true and only democrats; reconciling with democracy required an acceptance of self-doubt, a tempering of certainties, and a surrendering of privileges. Democracy involves both responsibility and humility. In his farewell speech to the Federal Constitutional Court where he had served as a judge, Böckenförde similarly insisted on the always necessarily unstable foundations of the constitutional order which, in the end, relies on the faith that the judge will,

¹¹⁹ Böckenförde, *Wissenschaft, Politik, Verfassungsgericht*, 424.

¹²⁰ See for instance, Falk, *Freiheit als politisches Ziel* or Dirk Lüddecke, “Gegenstrebige Fügungen der Demokratie,” in Mehring and Martin, eds., *Voraussetzungen und Garantien des Staates*, 119-142.

¹²¹ Hans Kelsen, “Foundations of Democracy,” *Ethics*, 66 (1955), 1-101, at 40-2.

¹²² *Ibid.*

“out of his own ethos and his own responsibility,” wield his authority in accordance with the way in which the law and the Constitution intended the duties of his office. “Sure enough, the recourse to responsibility can only lend a relative safeguard. Responsibility must be embraced freely. But it belongs to the peculiarity of human things that they not rarely rely on solely relative foundations.”¹²³

¹²³ Ernst-Wolfgang Böckenförde, “Dem Bundesverfassungsgericht droht der Kollaps,” *Frankfurter Allgemeine Zeitung*, 24 May, 1996.